

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NIKE, INC.,	)	
	)	
Plaintiff, Counter-Defendant,	)	
	)	
vs.	)	Case No. 1:23-cv-00771-AS
	)	
LULULEMON USA INC.	)	
	)	
Defendant, Counter-Plaintiff.	)	
	)	

NIKE, INC.'S OPENING CLAIM CONSTRUCTION BRIEF

lululemon v. NIKE, Inc. IPR2024-00159 Patent No. 9,375,046 Ex. 2005
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disclaimer. Because lululemon agrees that the words of this term are unambiguous—and because lululemon’s proposed construction is inconsistent with the claim language and the specification—this Court should decline to further construe this claim.

2. “tubular structures”

The parties dispute the meaning of “tubular structures,” which appears in asserted claims 1–3, 16, 17 and 20 of the ’046 patent. Claims 1 is reproduced below:

1. An article comprising:
 - a plurality of webbed areas that include a plurality of courses formed from a first yarn, the webbed areas having a front surface, the webbed areas configured to move between a neutral position and an extended position, the webbed areas being biased to move toward the neutral position and a plurality of **tubular structures** that are adjacent to the webbed areas, the **tubular structures** including a plurality of courses; wherein at least one of the webbed areas or **tubular structures** is configured to stretch to move the webbed areas to the extended position in response to a force applied to the article wherein in the neutral position, a first area of the front surface is hidden from visual observation from a first viewing perspective, and wherein in the extended position, the first area of the front surface is revealed for visual observation from the first viewing perspective.

’046 patent at 32:40–59 (emphases added). The parties’ proposed constructions are below:

Nike’s Construction	lululemon’s Construction
Ordinary and customary meaning; tube like structures.	Plain and ordinary meaning, which is elongated hollow structure

The parties agree that the term “tubular structures” in the ’046 patent should be given its ordinary meaning.¹ The only dispute is whether, as lululemon proposes, the ordinary meaning of “tubular structure” is limited to an “elongated hollow structure.” It is not.

¹ lululemon uses a synonymous term: “plain and ordinary meaning.” ECF No. 66 at 6–9. In this brief, Nike will use the term “ordinary meaning.” See *Phillips*, 415 F.3d at 1313.

The Court can resolve this dispute simply by looking to a 2019 case where the District of Massachusetts considered the very same claim, in the very same patent—and rejected essentially the same construction that lululemon now proposes. Puma Markman Order (Bowling Decl., Ex. I) at 15–17. In *Nike v. Puma*, the court rejected Puma’s argument that “tubular structure” meant “the structure of a hollow elongated cylinder.” *Id.* The *Puma* court instead construed “tubular structure” to have its ordinary and customary meaning: “tube-like structures.” *Id.* This Court should reach the same conclusion.

The *Puma* court rejected the “hollow elongated cylinder” proposed construction on two grounds. *Id.* at 16–17. First, the court rejected the argument that a “tubular structure” must be shaped like an “elongated cylinder.” *Id.* at 16. To the contrary, the court found, the ’046 patent specification “provides that the tubular structure can vary in shape and dimensions.” *Id.* For example, the tubular structures may have a “wider top portion . . . and a narrower lower portion.” *Id.* (citing ’046 patent at 7:34–44). As another example, the tubular structures “can be shaped as a generally circular or elliptical cylinder.” *Id.* Second, the *Puma* court “reject[ed] a construction imposing a hollow limitation into the tube-like structures.” *Id.* at 17. The court made two important findings on this point: (i) the “term ‘tubular’ ordinarily encompasses non-hollow (or solid) tube-like structures” and (ii) “nothing in the intrinsic evidence disavows such structures.” *Id.* The court explained that, although the specification discloses certain embodiments in which the tubular structures are hollow, it would be “improper to read limitations from a preferred embodiment described in the specification—even if it is the only embodiment—into the claims.” *Id.* (quoting *Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898, 913 (Fed. Cir. 2004)).

The *Puma* court’s reasoning is equally valid here. lululemon’s proposed construction improperly imports limitations from certain embodiments into the claims, excluding other

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